

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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ROBERT J. HANFLING,  
Chapter 7 Trustee of the Bankruptcy  
Estates of ATG, Inc. and ATG  
Catalytics, LLC,

Plaintiff,

v.

EPSTEIN BECKER & GREEN, P.C.,

Defendant.

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Civil Action No. 05-10077-RGS

**MOTION TO STRIKE DEPOSITION TESTIMONY OF ALAN BRAUNSTEIN**

Defendant Epstein Becker & Green, P.C. (“EBG”) hereby moves to strike the deposition testimony of Alan Braunstein, submitted by plaintiff Robert I. Hanfling, Chapter 7 Trustee of the bankruptcy estates of ATG, Inc. and ATG Catalytics, LLC (the “Trustee”) in opposition to EBG’s motion for summary judgment.

As grounds for its motion, EBG states:

1. On June 7, 2006, EBG moved for summary judgment on the sole remaining count of the Complaint in this matter, alleging legal malpractice by EBG in its representation of ATG.

2. On July 7, 2006, the Trustee opposed EBG’s motion. Among the materials it submitted in opposition was a series of excerpts from the deposition of Alan Braunstein, taken by EBG in this matter.

3. Mr. Braunstein, a Boston lawyer, was counsel to the Chapter 11 Trustee of the bankruptcy estate of Molten Metal Technology, Inc. (“MMT”). The Chapter 11 Trustee, Stephen Gray, was appointed in late August 1998 and Mr. Braunstein appointed to act as his counsel between

late August and mid-September 1998. Braunstein Dep. at 5-7 (Ex. A hereto). Mr. Braunstein has no personal knowledge of EBG's legal work for the MMT employees, which was performed both prior to the MMT bankruptcy and during the debtor-in-possession period. The matters with respect to which Mr. Braunstein offers testimony in the deposition excerpts are completely outside his personal knowledge. As submitted by the Trustee as Fleischer Affidavit Exhibit F and Fleischer Supplemental Affidavit Exhibit N, they include:

a. hearsay statements attributed to Daniel Cohn, counsel to MMT as debtor-in-possession (Braunstein Dep. at 39-40 and 50-51) and undisclosed participants in the MMT Shareholder Litigation (*id.* at 81-82);

b. imperfectly remembered information from documents that were neither authored by nor addressed to Mr. Braunstein and that Mr. Braunstein reviewed long after their creation (Braunstein Dep. at 39, 53-54, 82); and

c. speculative conclusions that Mr. Braunstein has drawn from after-the-fact review of documents, as to which he has no first-hand knowledge, and discussions with third parties (Braunstein Dep. at 70-71, 78-82 ).

4. The Court should strike Mr. Braunstein's deposition testimony because the testimony contained in the excerpts is not independently admissible in evidence.<sup>1</sup> Rule 56(e) requires that supporting affidavits "set forth such facts as would be admissible in evidence." FED R. CIV. P. 56(e). "Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir.1990); *accord Vazquez v. Lopez-Rosario*, 134

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<sup>1</sup> Mr. Braunstein does testify on personal knowledge with respect to document production by the MMT Trustee to the ATG Trustee, plaintiff herein, and document production in a state court lawsuit brought by the ATG Trustee against the MMT Trustee. Braunstein Dep. at 71-77. It is not clear why this excerpt was included in the record, however, as the Trustee did not rely upon it in his summary judgment papers and it does not appear relevant to any issue raised on EBG's motion for summary judgment.

F.3d 28, 33 (1<sup>st</sup> Cir. 1998). Lay witness opinion testimony is inadmissible unless “rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness’ testimony or the determination of the fact in issue.” Mr. Braunstein’s testimony consists variously of hearsay statements, unsupported conclusions and speculative assertions and thus does not satisfy the standards of personal knowledge, admissibility and competence required by Fed.R.Civ.P. 56(e). “The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit.” *Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 6 (1st Cir.1998).

WHEREFORE, EBG requests that its Motion to Strike Deposition Testimony of Alan Braunstein be allowed.

EPSTIEN BECKER & GREEN, P.C.

\_\_\_\_\_/s/ Paula M. Bagger\_\_\_\_\_  
Marjorie Sommer Cooke (BBO # 097800)  
Paula M. Bagger (BBO # 547703)  
COOKE, CLANCY & GRUENTHAL, LLP  
265 Franklin Street  
Boston, MA 02110  
(617) 428-6800

Dated: July 24, 2006

**CERTIFICATE OF SERVICE**

I, Paula M. Bagger, hereby certify that I have this 24th day of July, 2006, served a true copy of the foregoing upon counsel for the plaintiff through the Court’s CM/ECF system.

\_\_\_\_\_/s/ Paula M. Bagger\_\_\_\_\_  
Paula M. Bagger

# ***Transcript of the Testimony of Alan L. Braunstein***

***Taken: April 10, 2006***

***Volume: 1***

***In the Matter of:***

***Robert I. Hanfling, Et Al,  
Plaintiff,***

***v.***

***Epstein, Becker & Green, Et Al,  
Defendants.***

***Reported By Heidi B. Stutz***

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: ATG, INC., ET AL,  
Debtors  
Case Nos.  
01-46389 N11  
02-43161 N11  
02-43163 N11  
02-43164 N11

\* \* \* \* \*

ROBERT I. HANFLING, CHAPTER 11  
TRUSTEE FOR ATG, INC. and ATG  
CATALYTICS LLC,  
Plaintiffs

vs.

Adv. Pro. No.  
03-04806

EPSTEIN, BECKER & GREEN, P.C.,  
JOHN PRESTON, CHRISTOPHER  
NAGEL, EUGENE BERMAN, ETHAN  
JACKS, QUANTUM CATALYTIC LLC,  
ABC CORPS 1 THROUGH 5 and JOHN  
DOES 1 THROUGH 5,  
Defendants

DEPOSITION of ALAN L. BRAUNSTEIN, a  
witness called by and on behalf of the Defendant  
Epstein, Becker & Green, P.C., taken pursuant to the  
Federal Rules of Civil Procedure, before Heidi B.  
Stutz, Certified Shorthand Reporter No. 146599S and  
Notary Public in and for the Commonwealth of  
Massachusetts, at the offices of Riemer &  
Braunstein, LLP, 3 Center Plaza, Boston,  
Massachusetts, on Monday, April 10, 2006, commencing  
at 11:02 a.m.

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13 on behalf of the Deponent

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I N D E X

WITNESS: DIRECT CROSS REDIRECT RECROSS

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\*\*\*ALL EXHIBITS KEPT BY ATTORNEY BAGGER\*\*\*

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P R O C E E D I N G S

Whereupon:

ALAN L. BRAUNSTEIN,  
having been satisfactorily identified and duly sworn  
by the Notary Public, was examined and testified as  
follows:

DIRECT EXAMINATION

BY MS. BAGGER:

Q. Good morning, Mr. Braunstein.

A. Good morning.

Q. Thank you for being here. My name is  
Paula Bagger and I represent Epstein, Becker &  
Green, P.C. which is a defendant in the action  
Robert I. Hanfling versus Epstein, Becker & Green,  
et al, Civil Action Number 05-10077, pending in  
United States District Court.

Could you state your full name for  
the record, please?

A. Alan Louis Braunstein.

Q. And you are currently counsel to the  
Chapter 11 Trustee of the Molten Metal Technologies  
bankruptcy?

A. Technically not. I was counsel. Plan was  
confirmed, so now I'm counsel to the plan

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1 administrator.

2 Q. And what date was the plan confirmation?

3 A. I believe it was February 13th of this  
4 year, 2006.

5 Q. And is Stephen Gray the plan  
6 administrator?

7 A. He is.

8 Q. And was Stephen Gray the Chapter 11  
9 Trustee?

10 A. He was.

11 Q. Do you remember the month and year of your  
12 appointment as Chapter 11 Trustee?

13 MR. SUTTON: Objection. He's not  
14 the Trustee.

15 Q. I'm sorry, as counsel to the Chapter 11  
16 Trustee.

17 A. August, 1998.

18 Q. And do you recall approximately the date  
19 of Mr. Gray's appointment as Chapter 11 Trustee?

20 A. The way it works is that what happened is  
21 the Court enters the order appointing the Trustee.  
22 Then the U.S. Trustee makes his choice or her  
23 choice. Actually, it was his choice at that time,  
24 Chris Marshall was the Trustee. And then the

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1 Trustee files a document with the court. So it's a  
2 process that sometimes is a week to ten days. So  
3 the actual date would be the Trustee was appointed  
4 on this date, Steve Gray was appointed as Trustee by  
5 the U.S. Trustee, and then the court affirmed that  
6 appointment. That I believe took place over the  
7 last week in August of 1998. I don't remember the  
8 exact date. The date that we've been using for  
9 purposes of our pleadings are on or about August  
10 24thth.

11 Q. And how much, how long a period of time  
12 elapsed between Mr. Gray's appointment becoming  
13 final and you being appointed counsel to Mr. Gray,  
14 approximately?

15 A. Again, because of the way it works with  
16 regard to bankruptcy, Mr. Gray called us, and  
17 ostensibly with our local rules we were asked to be  
18 counsel to the Trustee subject to a pleading,  
19 subject to the approval of the court. Again, those  
20 are three separate days. When you're asked, your  
21 employment becomes nunc pro tunc without further  
22 order of the court once you apply your application.  
23 And when the order enters, it then dates all the way  
24 back. All this was a period of I believe late

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1 August to mid-September of 1998.

2 Q. At the point that you started acting as  
3 counsel to Mr. Gray what was the status of efforts  
4 to sell assets of Molten Metal Technology?

5 A. The Trustee was soliciting offers and in  
6 doing so consulted with the debtor's counsel and the  
7 creditors' committee, as well as I believe the  
8 Blackstone Group. There were number of parties that  
9 were involved during the, what we call the debtor in  
10 possession period before the appointment of a  
11 Trustee. And during that time period the parties  
12 had solicited various offers for some of the assets  
13 of the debtor. I don't know specifically, but that  
14 was the posture that things were in. Blackstone was  
15 hired for that purpose. The creditors' committee on  
16 its own, we were informed, were looking at the ways  
17 to sell Bay City to a liquidator, those sort of  
18 things. So the Trustee investigated those avenues  
19 that had been explored previously by the predecessor  
20 professionals in the case and then set out on what  
21 he thought was the most appropriate course going  
22 forward.

23 Q. Did the Blackstone Group's appointment end  
24 when you became the -- excuse me, when Mr. Gray

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